TOH YEE SUM & ORS.

v.

LAM WAI HWA & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SUFFIAN LP
[ORIGINATING SUMMONS NO. 179 OF 1978]
16 APRIL 1979

FAMILY LAW: *Marriage - Validity of - Marriage of deceased to 1st respondent according to customary rites - Deceased's subsequent marriage to1st applicant registered under the Registration of Marriages Enactment (FMS Cap. 111) - Whether 1st applicant lawful wife of deceased - Section 9 of Enactment (FMS Cap. 111)*

SUCESSION: *Distribution of estate - Widows and children's shares - Letter of administration taken out by wife married under customary rites - Whether wife and issue under subsequent registered marriage entitled to share in deceased's estate - Whether applicant's claim statute barred - Consideration of ss. 6, 22, 23, 26 of Limitation Ordinance1953.*

On 11 May 1947, the deceased married the 1st respondent according to customary rites and they had seven children. Five years later, the deceased entered into a Marriage Agreement with the 1st applicant wherein the deceased agreed *inter alia* to pay the applicant a minimum of RM300 per month maintenance. On 21 February 1953, this marriage was registered under the Registration of Marriages Enactment (FMS Cap. 111) and it was stated in the Certificate of Registration that the deceased had no other wife living. There were four children from this marriage. The deceased passed away on 22 December 1960 and letters of administration were granted to the 1st and 2nd respondents on 24 August 1961. Thereafter, the 1st applicant received RM300 per month as maintenance from the estate of the deceased until 1968 afterwhich the payments were made by one of the family companies to which the deceased was a shareholder. The sum was later increased to RM700, until 24 July 1975 when payments stopped. Upon enquiry by the 1st applicant's solicitors, it was discovered that she and her children had been omitted from the list of beneficiaries of the deceased's estate in the letter of administration.

On 24 March 1978, the applicants applied for a declaration that they were beneficiaries of the estate. The respondents opposed this application on the grounds that (i) the claim was statute barred as the claim ought to have been brought within six years from 1968 when payments by the estate ceased; (ii) that the deceased's declaration in the Certificate of Registration that he had no other wife living clearly showed that he intended to "marry" her as a principal wife. Since a Chinese may only have one principal wife, the declaration was false and the second "marriage" was bad in law; and (iii) that the Marriage Agreement showed that the "marriage" was a conditional one and if the 1st applicant had any right, it was contractual and she should have sued the estate within six years.

The issues were, (i) whether the 1st applicant was the lawful wife of the deceased and if so, whether she and her children were entitled to a share in the estate; and (ii) if the applicants were beneficiaries under the estate, whether their claim was time barred.

Held:

[1] The marriage of the 1st applicant to the deceased was a valid marriage, the marriage having been registered under s. 9 of FMS Cap. 111.

[2] The claim falls squarely within s. 23 of the Limitation Ordinance 1953, being a claim to a share in the personal estate of a deceased person which should be brought within twelve years from the date when the right to receive the share accrued, which at worst was some time in 1968 or at best some time in 1975; and in either case this originating summons, being brought in 1978, was brought well within the time.

[Application allowed. Costs to be paid out of the estate.]

Legislation referred to:
Limitation Ordinance 1953, ss. 6(1), (2), 22(1), (2), 23, 26
Registration of Marriages Enactment, (FMS Cap 111), s. 9

For the applicants - S.C. Loh; M/s. Chooi & Co.
For the respondents - G.T. Rajan; M/s. G.T. Rajan & Co.

JUDGMENT

Suffian LP:

I am dealing with this matter sitting alone in the High Court.

On 11 May 1947, the deceased married the first respondent according to Chinese customary rites and a reception was held at the Wong Kee, a well-known restaurant in Kuala Lumpur.

Subsequently they had seven children, now aged between 18 and 30.

About five years later on 3 December 1952, the deceased entered into a Marriage Agreement with the first applicant. The Agreement contained the following among other terms - that the deceased would pay the first applicant at least RM300 a month maintenance [Clause 1(a)], and that in the event of the deceased deserting the first applicant he would nevertheless continue to pay the first applicant this monthly allowance [Clause 1(c)] and the wife would be at liberty to pursue her own way of life with complete freedom from the husband (Clause 3).

On 21 February 1953, this marriage was registered under the Registration of Marriages Enactment, FMS Cap. 111. The Certificate of Registration stated that the religion of both the deceased and the first applicant was Buddhism, that their marriage was celebrated in accordance with Buddhist rites, that the marriage was contracted at the Kum Leng, another well-known restaurant in Kuala Lumpur. It is also stated in the certificate that the deceased had no other wife living.

By this marriage the deceased had four children applicants No. 2 to No. 5

The deceased died on 22 December 1960, and Letters of Administration were granted to the first and second respondents on 24 August 1961.

Thereafter the first applicant received RM300 as maintenance for herself and the other applicants (her children) from the estate of the deceased. This sum was increased to RM700 per month from 1972. From 24 July 1975, the money stopped coming.

The first applicant's solicitors on enquiry found that she and her children had been omitted from the list of beneficiaries of the deceased's estate in the respondents' petition for Letters of Administration.

On 24 March 1978, the applicants took out an originating summons for a declaration that they were beneficiaries of the estate.

The application is opposed by the two respondents on the following grounds as submitted orally before me:

(1) that any claim against the estate ought to have been brought within six years from 1968, when payments by the estate ceased and that accordingly the applicants' claim dated 24 March 1978, is statute-barred (originally it was submitted that time ran from 1961 when letters of administration were granted, but this submission was later abandoned);

(2) that the deceased's declaration in the Certificate of Registration that he had no other wife living clearly showed that he intended to "marry" her as a principal wife (not a secondary wife), that a Chinese may have only one principal wife (not two), that the declaration being false, this second "marriage" was bad in law and that therefore the first applicant was not lawfully married to the deceased; and

(3) that Clause 1(c) of the Marriage Agreement shows that the "marriage" was intended to be a conditional one, that if at all the first applicant has a right, it is contractual one under the Agreement, not as a secondary wife, and that at the most she could have sued the estate under the Agreement, which she should have done within six years, which she has not done.

Thus there are two issues. First, was the first applicant the lawful wife of the deceased? If she was, then she is entitled to share in his estate, and likewise her children (it is not disputed that they are her children by him).

Secondly, if the applicants are beneficiaries of the estate, have they made their claim too late?

First issue

As to the validity of the first applicant's marriage to the deceased - I am satisfied that it was a valid marriage. The parties being Chinese not of the Christian or Muslim religion, and the marriage having been registered under FMS Cap. 111, s. 9 thereof applies. That section reads:

> 9. An extract from any register certified by the Registrar under his hand to be a true extract from the register shall be admissible in all Courts as evidence that a marriage was contracted between the parties therein named and at the place and time therein specified and in the presence of the persons therein stated to have been present thereat but not of the validity of such marriage; but the Court may in the absence of evidence to the contrary presume any marriage registered under this Enactment to have been valid and the onus of proving that there was no such marriage shall be on the person who asks the Court to believe that there was no such valid marriage.

Applying that section, it is clear that the Certificate of Registration is evidence that a marriage was contracted between the first applicant and the deceased, and in the absence of sufficient evidence to the contrary I presume and find the marriage valid.

I do not agree that the marriage was a conditional one nor do I agree that it was null and void because of the non-disclosure by the deceased of the marriage to his first wife.

Second issue

As regards limitation, Mr. Rajan (Counsel for the respondents) submitted that s. 23 of the Limitation Ordinance 1953, did not apply as there was no claim made by the first applicant for a share in the estate from 1962 until 1978, a period of fifteen years; and that s. 6(2) of the Ordinance applied (namely that the action should have been brought within six years, this being partly an action for an account). Finally Mr. Rajan submitted that while it was true

that the estate paid the first applicant, that was so only until 1968 and that payments made to her after that were made, on the first applicant's own admission set out in her letter of 24 July 1975, by "one of the family **companies** to which the deceased was a shareholder, a legal person distinct from the estate."

Reference was made during submissions to ss. 6 (1), 6(2), 22(1), 22(2), 23 and 26 of the Limitation Ordinance.

In my judgment this claim falls squarely within s. 23, being a claim to share in the personal estate of a deceased person which should be brought within twelve years from the date when the right to receive the share accrued, which at worst was some time in 1968 or at best some time in 1975; and in either case this Originating Summons, being brought in 1978, was brought well within time. This claim has not therefore been brought too late.

Accordingly there shall be judgment for the applicants. It is hereby declared that the first applicant is the lawful widow and the other applicants the lawful issue of the deceased and that they are entitled to share in his estate according to law.

As regards prayers, 4, 5 and 6 - at this stage I decline to make any order, hoping that the parties will come to an amicable arrangement following this judgment, except to say that there shall be liberty to apply on or before 16 July.

Finally I order that costs of this application shall be paid out of the estate, the quantum to be decided by me on or before 16 July unless the parties agree it before then.

In case there is an appeal, I set out my findings of facts on other aspects of the case as placed before me.

On the evidence produced before me in open Court, I am satisfied that the first respondent lived at 11 Fort Road, Klang; that the Comptroller-General of Inland Revenue ("CGIR") sent the first applicant's income tax return forms ("Form B") not to her address but to 11 Fort Road, Klang; that the forms were brought to the first applicant, who signed them in blank; that she could only sign her name; that some one connected with the first respondent took them back to 11 Fort Road, Klang and filled in the blanks and forwarded the forms to CGIR. Reference to the forms as regards the years of assessment 1968 onwards shows that among the income declared as having been received by the first applicant during the years 1968 until 1970, both years inclusive, was money from "Estate of Tong Poh Hwa (deceased)", namely from the deceased's estate. As the first applicant cannot read or write Malay and English or type, I am satisfied that these entries in the forms were filled in by some one with authority over the deceased's estate and accordingly acknowledges that the first applicant was widow entitled to a share in the estate.

I am further satisfied that as alleged by the first applicant there were further payments made to her between 1971 and 1975, both years inclusive and that these payments were made not by the estate as such but by a company in which the deceased was probably shareholder. There was no evidence as to the extent of his holding or of holding if any of the first respondent and other members of the deceased's family.

Also found at [1983] 1 CLJ 209